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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 233

JOAN BRODEL (professionally known as Joan Leslie),
Petitioner,

vs.

WARNER BROS. PICTURES, INC. (a corporation),
Respondent.

PETITION FOR A REHEARING.

MAX RADIN,
Boalt Hall, University of California, Berkeley 4, California,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Washington Loan & Trust Co. Building, Washington, D. C.,
Attorneys for Petitioner.

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WARNER BROS. PICTURES, INC. (a corporation),
Respondent.

PETITION FOR A REHEARING.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Joan Brodel, respectfully petitions this Honorable Court for a rehearing on her petition that a writ of certiorari issue to the Supreme Court of the State of California in the above entitled cause.

The petition for a writ of certiorari was duly filed before the Court and on October 18, 1948, was denied.

The reason for requesting a rehearing under Rule 33, Section 2 of the Rules of the Supreme Court as amended on October 13, 1937, is the following:

It appears affirmatively from the appended affidavits, Appendices A, B, C and D that the contract sued upon in the Court below, a copy of which was made part of the record and is before this Court in the petition for a writ of certiorari, denied on October 18th, that the alleged contract contained a series of options, that these options were six in number and that the options prior to the commencement of this action on April 15, 1946, were exercised by the respondent, and that the last option under the alleged contract, even if valid, would have had to be exercised at least thirty (30) days before March 30, 1948, in order to create a contract.

It appears further that this option which if valid should have been exercised on February 29, 1948, was not exercised at all, either at that time or at any time since.

It appears consequently, that even on the respondent's own showing, there is not now and there has not been since March 31, 1948, any contract of any sort between the plaintiff and defendant, and consequently there is no contract for the breach of which an action for an injunction could possibly lie.

What a moot question is has often been decided. The following cases give the general rule.

That equity case is "moot" in which no decree consistent with the pleadings and existing facts will benefit any party as against the other parties to the litigation.

U. S. v. Pan-American Comm., 261 F. 229, 231.

A "moot case" is one which seeks to determine an abstract question which does not rest upon existing facts or rights.

Adams v. Union R. R., 42 A. 517, 21 R.I. 140, 44 L.R.A. 273.

Where, in course of proceeding in a litigated matter, the controversy between the parties comes to an end, either by act of the parties or by operation of law, question becomes moot.

Walling v. Shenandoah-Dives Mining Co., 134 F. (2d) 395, 396.

Courts will not continue to litigate controversy that has ceased to exist.

State ex rel: *Banghman v. Woodruff*, 106 S. W. (2d) 1088, 1089.

An appeal from discharge in *habeas corpus* became moot when the sentence had expired.

Patterson v. Jones, 141 F. (2d) 319, 321.

No allegation was ever made by the respondent that notice of exercising the option on February 29, 1948, was ever given to petitioner on that date or at any other time. In the brief filed by respondent before the Supreme Court of California in opposition to the petition for a rehearing, the respondent alleged that the letter of May 7, 1946 (Appendix C) was the equiv-

alent of such a notice of exercising an option. Since nearly a year later, on February 7, 1947, (App. D) the respondent duly exercised the fifth option, it is impossible to see how the letter of May 7, 1946, could have been the exercise of the sixth option. On the allegations of the respondent's complaint, the existence of these options is fully admitted as well as the duty of exercising them at the time specified. It was specially and insistently alleged by the respondent that its claim against the petitioner was based on the seasonable exercise of its options each year, thirty days before March 30 of that year.

The petitioner, therefore, had a legal right, even if her contentions on the illegality of the contract under the Fourteenth Amendment to the Constitution of the United States, were rejected, to have it determined that the controversy so far as it dealt with any duty of the plaintiff to perform services for the defendant after March 30, 1948, was wholly and entirely moot, and that there could be no issue raised between the petitioner and the respondent based on the existence of any contractual obligations after that date.

That a controversy which was in every sense a perfectly valid one may become moot by matters supervening pending an appeal is apparent from the following cases.

Where it clearly appears by reason of changed circumstances between the time of the trial of the action and its review by the Supreme Court, that any judgment the Supreme Court may render will be unavail-

ing as to the particular issue litigated, the Supreme Court ordinarily will not consider and decide the "moot question" whether of law or fact.

Dickey Oil Co. v. Wakefield, 153 Kan. 489, 111 P. (2d), 1113, 1114, 1115.

Termination of contract caused question of breach to become a moot question.

McDonald v. Brewery Drivers Union, 215 Mont. 274; 9 N. W. (2d) 770, 772.

Whether applicant for appointment as administrator was disqualified by reason of his non-age at time of application, was a "moot question" when applicant had reached age of twenty-one before disposition of his appeal.

Hoch v. Hoch, 163 S. W. (2d) 433, 436.

In *Dexter v. Superior Court,* 15 Cal. (2d) 405, it was decided as a matter of course that if a man died after conviction of a crime but before a fine was imposed, no such fine could be imposed, since the issue of punishment had become moot. Similarly, in *Morrow v. Morrow,* 62 Nev. 492, when the defendant in a divorce suit died, after the divorce had been granted, and before appeal, the issue became moot. Conceivably in a different system of law, the fine could still be imposed on his estate, or alimony charged against the estate of a deceased. But that is not our law.

For the Supreme Court of California to refuse to pass on the question of such importance as this, to-wit, whether a controversy had become moot, and to refuse when it must have clearly appeared on examina-

tion that it was moot, is to deny the petitioner her day in Court on this question.

When the appeal was argued before the Supreme Court of the State of California on September 16, 1947, the issue whether the controversy was moot could of course not have been raised. The fifth option on the alleged contract had been fully exercised thirty days before March 30, 1947, and if the contract were a valid one, an obligation to perform services for the respondent for a year from March 30, 1947, would have been in existence.

The Supreme Court held the appeal under consideration from September 15, 1947, to May 3, 1948. No opportunity for further argument was given after the original argument.

On May 3, 1948, the Supreme Court handed down its decision reversing the decision of the District Court of Appeals in favor of the petitioner and deciding adversely to the petitioner on the question of the constitutionality of the law which deprived her of her right of disaffirming after majority the contract made when she was a minor.

Then for the first time, an opportunity was offered the petitioner to present to the Supreme Court of California, her reasons for holding that the controversy had become moot while the Supreme Court was considering the case, since there was no longer a contract which could be breached.

The petitioner therefore duly filed her petition before the Supreme Court for a rehearing of the case, and based her petition primarily on the fact that the

controversy had become moot on March 30, 1948, when for want of seasonable exercise of the option on February 29, there was no contract even on the respondent's own showing, between respondent and petitioner. The Supreme Court of California denied the petition for a rehearing on May 27, 1948. No argument was heard. No reason was given.

It is not alleged by the respondent, and it could not very well be alleged by any one that the Supreme Court of California, claims the power to pass on a moot question. So far from that it has on a number of occasions specifically refused to decide a question for the very reason that during the course of litigation it had become moot.

It is not a question of a legal error. The matter goes to the power of the Court. We may cite *U. S. v. Alaska S. S. Co.*, 253 U. S. 113; 40 S. Ct. 448, 64 L. Ed. 808. The Court states:

> "It is a settled principle in this court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court '*is not empowered to decide moot questions* or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. * * *' (People

of State of) California v. San Pablo & Tulare R. Co., 149 U. S. 308, 314, 13 S. Ct. 876, 878, 37 L. Ed. 747." (Emphasis added.)

There is therefore a determination by this Court that a Court has *no power* to pass on a moot question and that therefore the Supreme Court of California has attempted to go beyond the province of any Court in doing so. It is a denial of due process of law when a Court acts in a way it is not empowered to act.

More than that, if it had attempted to pass on such a question, it would be clear that in doing so, it was attempting to exercise a non-judicial function.

Due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, requires the observance of that aspect of separation of powers which has been made a fundamental part of the constitutional law of the United States and is implied in the constitutional duty of the United States to guarantee to each State a republican form of government, Article IV, Section 4.

When a state executive assumes judicial or legislative power, when a state legislature assumes executive or judicial power and when a Court undertakes to act in any capacity, except a judicial one, it violates due process.

It is submitted that under the undisputed facts here presented — since the respondent at no time has alleged and does not now allege that it exercised its option in 1948—the Supreme Court of California was under the Constitution of the United States required

to dismiss the cause before it as moot, and under any circumstances, to have given the petition a hearing on this question which arose after the case had been submitted and while it was under consideration.

It is this opportunity, part of due process of law, which the petitioner now respectfully requests of this Court. It is a question which would not have been properly presented in the petition for certiorari, since that concerned itself with the decision of the Supreme Court of California under a statute asserted by the petitioner to be unconstitutional. It is new matter, not heretofore presented to this Court in this case.

Dated, Berkeley, California,
October 29, 1948.

MAX RADIN,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Attorneys for Petitioner.

I hereby certify that this petition for a rehearing is presented in good faith and not for purposes of delay.

Dated, Berkeley, California,
October 29, 1948.

MAX RADIN,
Attorney for Petitioner.

(Appendices A, B, C and D, Follow.)

Appendix A

MAX RADIN,
Boalt Hall, University of California, Berkeley 4, California,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Washington Loan & Trust Co. Building, Washington, D.C.,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 233

Joan Brodel (professionally known as Joan Leslie),
Petitioner,
vs.
Warner Bros. Pictures, Inc. (a corporation),
Respondent.

AFFIDAVIT OF OSCAR R. CUMMINS.

State of California,
County of Los Angeles.—ss.

Oscar R. Cummins, being first duly sworn, deposes and says:

That I am an attorney-at-law, duly licensed to practice in all the Courts of the State of California, and that I am one of the attorneys for Joan Brodel, pro-

fessionally known as Joan Leslie, the petitioner in the above entitled action.

That at all times during the pendency of the above action, both in the lower Court and the Appellate Courts of the State of California, petitioner Joan Brodel has denied since attaining her majority, that the said alleged contract was, and/or is valid in any way whatsoever, and has, since attaining her majority, maintained the said alleged contract is non-existent and wholly and completely void.

That affiant is averring the following facts which were not brought before this Honorable Court in the original Petition for a Writ of Certiorari by your petitioner:

1. That the said alleged contract provides in Section 3 thereof, employment for a period of fifty-two (52) weeks, and provides in Section 28 thereof, options for the renewal thereof for six (6) successive periods of fifty-two (52) weeks each, and further provides that if respondent herein desires to renew said alleged contract for any such fifty-two (52) week period, it must give notice in writing to the petitioner herein, Joan Brodel, at least thirty (30) days prior to the expiration of each fifty-two (52) week period. That is to say, at least thirty (30) days prior to the 30th day of March of each year.

2. That your affiant knows of his own knowledge that the petitioner Joan Brodel received no notice whatsoever from respondent, indicating its intention to renew the said alleged contract for an additional

fifty-two (52) week period from and after the 30th day of March, 1948; and that the last communications received by the petitioner from the respondent, are those attached hereto and marked Exhibits, "C" and "D", respectively. That as is shown by the attached Exhibits, at all times previously respondent had sent to petitioner Joan Brodel, each year thirty (30) days prior to the expiration of each fifty-two (52) week period, a notice exercising its option to renew the said alleged contract for an additional period of fifty-two (52) weeks. That Section 28 of the said alleged contract, among other things, provides that if the respondent desires to exercise the aforesaid right of option, the said right of option must be exercised consecutively, and that even if the said alleged contract were existent, respondent has failed to comply with the terms thereof, and such failure to comply was of their own volition, and through no act or omission on the part of your petitioner Joan Brodel.

3. That affiant as attorney for petitioner Joan Brodel, has received no such notice indicating the intention of the respondent to renew the said alleged contract for the fifty-two (52) week period beginning March 30, 1948, and affiant avers that the result of such failure and neglect and omission on the part of the respondent to so notify your petitioner, Joan Brodel, or her personal representatives, at least thirty (30) days prior to the 30th day of March, 1948, the said alleged contract has lapsed by virtue of its own terms, and, therefore, in addition to the fact that your petitioner Joan Brodel has denied the existence of the

said alleged contract, respondent has by its own omission rendered the said alleged contract non-existent, and, therefore, said alleged contract has lapsed, and is, therefore, a moot question.

That your affiant on the 20th day of April, 1948, and prior to the decision of the Supreme Court of the State of California on the 3rd day of May, 1948, requested the Honorable Phil S. Gibson, Chief Justice of the Supreme Court, to determine that the above matter was moot and to dismiss the appeal of the respondent Warner Bros. Pictures, Inc.

That your petitioner herein was never given an opportunity to be heard on the moot question herein involved, and is a matter which has never been presented to, nor determined by the Honorable Supreme Court of the United States.

Wherefore, affiant avers that by reason of the failure of the Supreme Court of the State of California to consider the moot question as aforesaid, petitioner was denied her day in Court and denied due process of law in violation of the Constitution of the United States of America.

Oscar R. Cummins.

Subscribed and sworn to before me this 19th day of October, 1948.

(Seal) Mildred Korcheck,
Notary Public in and for the said
County and State.

My Commission expires April 21, 1950.

Appendix B

MAX RADIN,
Boalt Hall, University of California, Berkeley 4, California,
BROWN, HENLON, LUND AND BABCOCK,
BERNARD M. FITZGERALD,
Washington Loan & Trust Co. Building, Washington, D.C.,
Attorneys for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 233

Joan Brodel (professionally known as Joan Leslie),
Petitioner,
vs.
Warner Bros. Pictures, Inc. (a corporation),
Respondent.

AFFIDAVIT OF JOAN BRODEL (PROFESSIONALLY KNOWN AS JOAN LESLIE).

State of California,
County of Los Angeles.—ss.

Joan Brodel, professionally known as Joan Leslie, being first duly sworn, deposes and says:

That I am the petitioner in the above entitled action;

That at all times during the pendency of the above action, both in the lower Court and the Appellate Courts, affiant has, since attaining her majority, denied the existence of the said alleged contract in controversy here, and has at all times since attaining her majority maintained that said alleged contract is non-existent and wholly and completely void;

That nevertheless, heretofore and on the following dates, to-wit: February 11, 1943, February 9, 1944, February 16, 1945, February 13, 1946 and February 5, 1947, respondent has notified affiant within the time provided in the said alleged contract, of respondent's intention to take up said option for successive fifty-two (52) week periods as provided therein;

That copies of the said notices in reference to the said option received from respondent, are attached hereto;

That the last such communication which affiant received from respondent pertaining to its intention to take up the said option for an additional period of fifty-two (52) weeks, was on or about the 5th day of February, 1947, whereby respondent notified affiant that it intended to exercise its option for the fifty-two (52) week period ending the 30th day of March, 1948, under the terms of the said alleged contract.

That at no time thereafter has affiant received any notification whatsoever from respondent, of its intention to exercise its option on its alleged contract for a fifty-two (52) week period beginning the 30th day

of March, 1948, and ending the 30th day of March, 1949.

Further, affiant sayeth naught.

Joan Brodel,
Joan Brodel (Professionally known as Joan Leslie).

Subscribed and sworn to before me this 19th day of October, 1948.

(Seal)

Mildred Korchek,
Notary Public in and for the said County and State.

My commission expires April 21, 1950.

Appendix C

Executive Offices
321 West 44th Street
New York

Telephone
Exchange
Holly 1251

Warner Bros.
Pictures, Inc.
West Coast Studios
Burbank, California
May 7, 1946

Miss Joan Brodel (Joan Leslie)
222 North Rose Street
Burbank, California

Dear Miss Brodel:

By notices dated May 2, 1946 and May 4, 1946, and pursuant to the rights granted to us under your contract of employment with us dated March 27, 1942, we directed you to report to the office of our Casting Director, Mr. Friedman, at our studio at Burbank, California, at 10:30 A. M. on Monday, May 6, 1946, for the purpose of commencing the rendition of your services for us under said contract in connection with the production of a motion picture to be produced by us with you appearing therein. You did not report as requested and directed by us nor have you reported to commence the rendition of said services since said date of May 6, 1946.

Therefore, under the circumstances, we desire to advise you that due to your failure, refusal and neglect to report to our studio as directed by us, as aforesaid, we elect to and do hereby exercise the right in said contract granted to us to refuse to pay you

any compensation thereunder commencing May 6, 1946 and continuing thereafter in accordance with the provisions in your said contract set forth, and particularly in accordance with the provisions of paragraph 23 thereof.

We desire to further advise you that we likewise elect to, and do hereby, exercise the right or option in said contract granted to us to extend said contract, and the current term thereof, and all of its provisions for a period equivalent to the period during which we shall not be obligated to pay compensation to you, except as such right of extension may be limited by any provision in said contract provided for.

Yours very truly,
Warner Bros. Pictures, Inc.,
By O. J. Obringer,
Assistant Secretary.

cc—Registered Mail (R.R.R.)
cc: Oscar R. Cummins
California Bank Bldg.,
9441 Wilshire Blvd.,
Beverly Hills, California,

Vitaphone
Reg'd. Trade Mark

Appendix D

Executive Offices
321 West 44th Street
New York

Telephone
Exchange
Holly 1251

Warner Bros.
Pictures, Inc.
West Coast Studios
Burbank, California
February 5, 1947.

Miss Joan Brodel
(Professionally known as Joan Leslie)
222 North Rose
Burbank, California.

Dear Miss Brodel:

With reference to your contract of employment with us dated March 27, 1942, as heretofore modified, amended and/or extended, and referring particularly to subdivision (e) of paragraph 28 of said employment contract, please be advised that the undersigned elects to and does hereby exercise the right or option granted to the undersigned in said subdivision (e) of said paragraph 28 of said contract.

Therefore, the term of your employment is extended for an additional period of fifty-two (52) weeks from and after the expiration of the present term of said contract, upon the same terms and conditions as are contained therein, except that the compensation to be paid you during such fifth extended period shall be the sum of one thousand seven hundred fifty dollars ($1,750) per week.

The exercise hereby of the option granted to us under said subdivision (e) of paragraph 28 of said contract is not to be deemed an acknowledgment by us in any way that the fourth extended period of said contract (being the current period thereof provided for in subdivision (d) of said paragraph 28) is or may be about to expire, nor shall the exercise hereby of the option referred to in said subdivision (e) of said paragraph 28 of said contract be deemed a waiver by us of any rights whatsoever we may have in the premises under the terms of said contract due to or growing out of the circumstances more particularly set forth in our notice to you dated May 7, 1946.

Yours very truly,

Warner Bros. Pictures, Inc.,
By O. J. Obringer,
Assistant Secretary,

cc: Registered Mail (R.R.R.)
cc: c/o Mr. Oscar R. Cummins
California Bank Bldg.,
Beverly Hills, Calif.
(Via Regular Mail &
Registered mail)

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